

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ERIC R. TOWNSEL,)	CASE NO. C07-0482-JLR
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
KEN QUINN, et al.,)	
)	
Defendants.)	
_____)	

INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff Eric Townsel has filed a civil rights action under 42 U.S.C. § 1983 seeking monetary relief for injuries suffered in a fall at the Monroe Correctional Complex, Washington State Reformatory Unit (“MCC-WSRU”) in Monroe, Washington. Plaintiff asserts in his complaint that defendants failed to provide safe living conditions and adequate clothing. Plaintiff also asserts that the named defendants, and others, attempted to interfere with his use of the grievance process and his right of access to the courts. Plaintiff identifies the following individuals as defendants in his complaint: Ken Quinn, Superintendent of the Monroe Correctional Complex (“MCC”); Mr. Kucza, Associate Superintendent at MCC at times relevant to the complaint; D.

01 Bustanaby, Custody Unit Supervisor at MCC; Sergeant Carmody; Lieutenant Bratten, and E.
02 Fansler.

03 Defendants have now filed a motion to dismiss this action.¹ Also pending before the Court
04 is plaintiff's motion to amend his complaint. Plaintiff, by way of his amended complaint, seeks to
05 correct the deficiencies in his original complaint which were identified by defendants in their
06 motion to dismiss, and to add new claims and new defendants to this action. The Court, having
07 reviewed the motions of the parties, and the balance of the record, recommends that defendants'
08 motion to dismiss be granted, and that plaintiff's motion to amend his complaint be granted in part
09 and denied in part.

10 FACTS

11 At times relevant to this complaint, plaintiff was a prisoner at the MCC-WSRU where he
12 resided in A-unit. (*See* Dkt. No. 7.) On November 21, 2005, plaintiff was exiting the A-unit
13 shower at MCC when he slipped on a floor covered with water. (*Id.* at 4.) As a result of this fall,
14 plaintiff suffered a laceration to his right hand, which severed two tendons, and an injury to his hip.
15 (*See id.* at 3-4.) MCC medical staff called 911 and plaintiff was taken to Valley General Hospital
16 for treatment of his hand injury. (*Id.* at 4.) Plaintiff was treated at the emergency room, stitched
17 up, and returned to MCC. (*Id.*) Nine days later, plaintiff was returned to the hospital to have the
18 severed tendons surgically repaired. (*Id.*)

19 Plaintiff contends that his shower accident, and the resulting injuries, were caused by the
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21 ¹ E. Fansler has not been served and therefore is not deemed a party to this action. The
22 motion to dismiss was brought on behalf of the remaining defendants identified by plaintiff in his
original complaint.

01 following factors: (1) the shower floors at MCC are smooth and slick and therefore unsafe for
02 their intended purpose; (2) the shower mats had been removed from the shower area for cleaning
03 while the showers remained open to be used by inmates; (3) the shower area had razor sharp metal
04 plates placed in a heavily used area which was known to be wet and slippery; (4) the MCC
05 clothing room was obligated to issue replacement shower shoes to inmates and failed to do so;
06 and, (5) the thongs available through the inmate store which the institution allowed to be used as
07 a shower shoe were inadequate for that purpose. Plaintiff also asserts that the institution and the
08 medical staff had an obligation to expedite the repair of his severed tendons and failed to do so.

09 DISCUSSION

10 Motion to Dismiss Pursuant to Fed. R. Civ. Pro. 12(b)(6)

11 An action may be dismissed for failure to state a claim only if it appears beyond doubt that
12 the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
13 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir.
14 1983). On a motion to dismiss, material allegations of the complaint are taken as admitted and
15 the complaint is to be liberally construed in favor of the plaintiff. *Keniston*, 717 F.2d at 1300.
16 Vague and conclusory allegations of official participation in civil rights violations are not sufficient
17 to withstand a motion to dismiss” *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (quoting
18 *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). “Dismissal can
19 be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under
20 a cognizable theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

21 In order to set forth a *prima facie* case under § 1983, a plaintiff must establish a
22 deprivation of a federally protected right. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). The

01 particular harm complained of must be scrutinized in light of specifically enumerated rights. *Id.*
02 That a plaintiff may have suffered harm, even if due to another's negligent conduct, does not itself
03 demonstrate a violation of constitutional protections. *Davidson v. Cannon*, 474 U.S. 344 (1986).

04 A defendant cannot be held liable under § 1983 solely on the basis of supervisory
05 responsibility or position. *Monell v. Department of Social Servs., of City of New York*, 436 U.S.
06 658, 691-694 (1978). The causation requirement of § 1983 is satisfied only if a plaintiff
07 demonstrates that a defendant did an affirmative act, participated in another's affirmative act, or
08 omitted to perform an act which he was legally required to do that caused the deprivation
09 complained of. *Arnold v. IBM*, 637 F.2d at 1355 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-
10 44 (9th Cir. 1978)).

11 Defendants argue in their motion to dismiss that plaintiff failed to state any constitutional
12 violations or to allege any facts rising to the level of a constitutional violation in his original
13 complaint.

14 ***1. Eighth Amendment***

15 Defendants correctly note in their motion to dismiss that plaintiff fails to allege any
16 violation of a constitutional right. Liberally construed, however, plaintiff's claims that defendants
17 failed to provide safe living conditions and adequate clothing implicate plaintiff's rights under the
18 Eighth Amendment.

19 The Eighth Amendment imposes a duty upon prison officials to provide humane conditions
20 of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This duty includes ensuring that
21 inmates receive adequate food, clothing, shelter, and medical care, and taking reasonable measures
22 to guarantee the safety of inmates. *Id.* In order to establish an Eighth Amendment violation, a

01 prisoner must satisfy a two-part test containing both an objective and a subjective component.
02 The Eighth Amendment standard requires proof that (1) the alleged wrongdoing was objectively
03 "harmful enough" to establish a constitutional violation; and (2) the prison official acted with a
04 sufficiently culpable state of mind. *Id.* at 834.

05 The objective component of an Eighth Amendment claim is "contextual and responsive to
06 'contemporary standards of decency.'" *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting
07 *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). The state of mind requirement under the subjective
08 component of the Eighth Amendment standard has been defined as "deliberate indifference" to an
09 inmate's health or safety. *Farmer v. Brennan*, 511 U.S. at 837. Under the "deliberate
10 indifference" standard, a prison official cannot be found liable for denying an inmate humane
11 conditions of confinement unless the official knows of and disregards an excessive risk to inmate
12 health or safety. *Id.* at 837. "[T]he official must both be aware of facts from which the inference
13 could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."
14 *Id.*

15 While plaintiff alleges that a number of factors contributed to his fall in the shower area
16 at MCC in November 2005, he does not allege any facts suggesting that any of the named
17 defendants knew of, and disregarded, an excessive risk to his safety. In fact, the exhibits which
18 plaintiff submitted in support of his complaint suggest the opposite. The exhibits submitted by
19 plaintiff consist, in part, of grievances filed by plaintiff following his accident which raise concerns
20 about the cleaning procedures, the unsafe conditions in the shower area, and the failure of the
21 institution to issue replacement shower shoes. The responses to these grievances reveal that after
22 plaintiff's fall, the cleaning procedures were modified, strips were welded over the sharp edges of

01 the metal plates to address the cut hazard, and a plan was implemented to address the shower shoe
02 issue. Thus, the record suggests that defendants, once made aware of the risks posed by
03 conditions in the shower area and of deficiencies in the clothing policy, acted quickly to address
04 those risks.

05 The facts alleged by plaintiff in his original complaint suggest, at most, that some of the
06 defendants may have been negligent in their duties. Negligent conduct, by itself, does not rise to
07 the level of a constitutional violation. *See Davidson, supra*. As plaintiff alleges no facts in his
08 original complaint demonstrating that any of the named defendants was deliberately indifferent to
09 his health or safety, defendants' motion to dismiss should be granted with respect to plaintiff's
10 claims which implicate Eighth Amendment concerns.

11 2. *Grievance Process*

12 Plaintiff also asserts in his complaint that he was denied good faith use of the grievance
13 process and access to the courts. Once again, plaintiff does not specifically allege a violation of
14 any federal constitutional right. Moreover, plaintiff does not specifically identify any defendant
15 who personally participated in causing this alleged harm, and he offers no facts to support these
16 allegations. Accordingly, plaintiff does not adequately allege a cause of action under § 1983
17 arising out of the alleged denial of access to the grievance process and, thus, his complaint should
18 be dismissed with respect to those claims as well.

19 Motion to Amend

20 This Court has concluded that plaintiff failed to adequately allege a cause of action under
21 § 1983 in his original complaint. The next question for this court is whether the deficiencies may
22 be cured by amendment. Plaintiff has presented the court with a proposed amended complaint in

01 which he expands on his allegations against the defendants named in his original complaint.
02 Plaintiff also identifies new claims and new defendants in his proposed amended complaint which
03 arise out of the November 2005 shower incident. The Court will now review whether the
04 proposed amended complaint adequately alleges any cause of action under § 1983 claim which
05 would permit this action to proceed.

06 ***1. Eighth Amendment Claims - Showers***

07 Plaintiff alleges in his proposed amended complaint that defendants Quinn, Kucza,
08 Bustanaby, and Carmody demonstrated deliberate indifference to his health and safety when they
09 deprived him of safe shower facilities. He also alleges that these defendants failed to inspect the
10 showers, failed to establish shower safety standards, and failed to regulate compliance with said
11 standards by their subordinates. However, plaintiff fails to allege any facts demonstrating that
12 these individuals had personal knowledge of the dangers posed by the condition of the showers
13 or by the cleaning procedures. The manner in which plaintiff sets forth his claims against these
14 four defendants suggests that he intends for them to be held liable based upon their supervisory
15 authority rather than their personal participation. This is not permitted under § 1983 *See Monell,*
16 *supra.*

17 Plaintiff further alleges in his proposed amended complaint that defendants Quinn, Kucza,
18 and Bratten, as well as Mr. Fansler, demonstrated deliberate indifference to plaintiff's health and
19 safety when they refused to issue him replacement shower shoes as mandated by Department of
20 Corrections policy. Plaintiff contends that the lack of proper shower shoes contributed to his
21 shower accident of November 21, 2005, and to the injuries he sustained as a result of that
22 accident. As to defendants Quinn, Kucza, and Bratten, plaintiff also alleges that these defendants

01 failed to properly train and supervise subordinate staff with respect to safety standards and
02 Department of Corrections policy.

03 Even assuming the lack of proper shower shoes contributed to plaintiff's fall, plaintiff's
04 allegations fall far short of what is required to state an Eighth Amendment claim. There is simply
05 nothing in the record to suggest that defendants knew of, and disregarded, the risk posed by the
06 failure of the clothing room to issue replacement shower shoes. In fact, it appears once again that
07 plaintiff is seeking to have Quinn, Kucza and Bratten held liable based solely on their supervisory
08 authority. This is not permitted under § 1983. *See Monell, supra.*

09 Plaintiff alleges in his proposed amended complaint that Correctional Officers Fletcher,
10 Florence, and Parker demonstrated deliberate indifference to plaintiff's health and safety when they
11 deprived plaintiff of safe shower facilities. Plaintiff contends that these three correctional officers
12 either removed, or personally instructed others to remove, the rubber shower mats. He further
13 contends that these three correctional officers had personal knowledge of the slick flooring in the
14 showers and that they ordered others to mop the slick flooring without posting any warning signs.
15 Plaintiff maintains that these actions contributed to his November 21, 2005, shower accident.

16 The manner in which plaintiff sets forth his allegations against these three defendants
17 suggests that he does not know which of these individuals may have been responsible for the
18 cleaning of the showers on the day in question. Moreover, plaintiff fails to allege facts
19 demonstrating that any of these individuals had a sufficiently culpable state of mind. The fact that
20 these individuals *may* have been involved in directing cleaning procedures which *may* have
21 contributed to plaintiff's accident is not sufficient to establish that these individuals knew of, and
22 disregarded, an excessive risk to plaintiff's health or safety.

01 Plaintiff alleges in his proposed amended complaint that Correctional Officer Zak
02 demonstrated deliberate indifference to plaintiff's health or when he deprived plaintiff of safe
03 shower facilities. Plaintiff contends that Zak was the safety officer and that he therefore had a duty
04 to conduct safety inspections, and to instruct others in safety inspections, which could have
05 exposed the serious safety hazards in the MCC-WSRU showers. Plaintiff contends that Zak's
06 indifference to his duty contributed to the November 21, 2005, shower accident.

07 As noted above, in order for a prison official to be found liable for denying an inmate
08 humane conditions of confinement, the official must be aware of facts from which an inference
09 could be drawn that a substantial risk of serious harm exists, and he must also draw that inference.
10 Plaintiff asserts that a variety of factors, including the physical make-up of the shower area, the
11 cleaning procedures, and the failure of the institution to issue proper shower shoes contributed to
12 his fall. However, plaintiff offers no facts demonstrating that Zak was aware of these various risk
13 factors and disregarded them. Plaintiff's claim that Zak *should* have known of these factors
14 because of his role as the safety officer suggests, at most, that Zak was negligent in the
15 performance of his duties. And, negligence is insufficient to support a federal constitutional
16 violation.

17 Plaintiff has not adequately alleged any cause of action under § 1983 based upon the
18 physical condition of the showers, the cleaning procedures, or the shower shoe policy.
19 Accordingly, plaintiff's motion to amend his complaint should be denied as to these claims.

20 **2. Eighth Amendment Claims - Medical Care**

21 Plaintiff alleges in his proposed amended complaint that defendants Quinn and Kucza,
22 along with Dr. Kenney, Physician's Assistants Shuey and King, and Dr. Munk denied him

adequate medical care for the injuries he suffered in his November 2005 shower accident.

a. Failure to Expedite Surgical Repair

Plaintiff asserts that defendants Quinn and Kucza, as well as Dr. Kenney, P.A. King and Dr. Munk, failed to expedite surgical repair of plaintiff's severed tendons. Defendants argue that plaintiff failed to grieve his claim regarding defendants' failure to timely treat his hand injury and that he therefore should not be permitted to amend his complaint to add this claim.

Section 1997e(a) of Title 42 of the United States Code provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Section 1997e(a) requires *complete* exhaustion through any available process. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002) ("All 'available' remedies must now be exhausted."); *Booth v. Churner*, 532 U.S. 731, 735 (2001).

Plaintiff, in response to defendants' exhaustion argument, has filed a motion to admit a grievance log to which he has attached grievances filed concerning his hand injury. Plaintiff appears to be of the belief that these documents demonstrate that he has properly exhausted his claim regarding timely treatment of his hand injury. In fact, these grievances were filed almost a year after plaintiff's hand was surgically repaired and they raise issues regarding plaintiff's recovery from the hand injury and not defendants' failure to expedite surgical repair in the first instance. To the extent plaintiff complains that his constitutional rights were violated when defendants failed to expedite repair of his severed tendons in November 2005, plaintiff has offered no evidence that he filed any grievance raising this precise claim. Accordingly, plaintiff's motion

01 to amend should be denied to the extent he seeks to add such a claim to this action by way of
02 amendment.

03 b. Defendants Quinn, Kucza, and Kenney

04 In addition to his assertion that defendants Quinn and Kucza, and Dr. Kenney, denied him
05 adequate medical care when they failed to provide prompt treatment for his injured hand, plaintiff
06 also asserts that these defendants failed to provide prompt treatment for plaintiff's hip injury.
07 However, plaintiff makes no showing that any of these individuals had any direct involvement in,
08 or responsibility for, plaintiff's medical care. Plaintiff's allegations appear to be directed at these
09 individuals in their roles as supervisory officials at MCC-WSRU. As noted above, supervisory
10 officials may not be held liable under § 1983 solely on the basis of the conduct of their
11 subordinates. Accordingly, plaintiff has not adequately alleged a cause of action against
12 defendants Quinn or Kucza, or against Dr. Kenney, based upon failure to provide timely medical
13 treatment. Accordingly, plaintiff's motion to amend should be denied with respect to plaintiff's
14 medical care claims against these three individuals.

15 c. Defendant Shuey

16 Plaintiff asserts that P.A. Shuey denied him adequate medical care when she failed to
17 intervene in plaintiff's transfer from MCC to the Washington State Penitentiary ("WSP"). Plaintiff
18 contends that P.A. Shuey was aware of plaintiff's prescribed treatments, and allowed one
19 prescribed treatment to be cancelled as a result of his transfer. Plaintiff also asserts that P.A.
20 Shuey was aware of the potential for denial of treatment at WSP, but failed to speak on plaintiff's
21 behalf with respect to the transfer. Finally, plaintiff appears to contend that P.A. Shuey failed to
22 make necessary arrangements to ensure that plaintiff had pain medication available for use during

01 his transfer.

02 The facts alleged by plaintiff simply do not suggest that P.A. Shuey caused plaintiff any
03 harm sufficiently serious to implicate Eighth Amendment concerns. Accordingly, plaintiff's motion
04 to amend should be denied with respect to plaintiff's claims against P.A. Shuey.

05 d. P.A. King

06 Plaintiff asserts that P.A. Kelly King denied him adequate medical care when she failed to
07 expedite surgical repair of plaintiff's severed tendons and failed to provide an MRI after plaintiff
08 complained on numerous occasions of pain and loud popping noises in his right hip. As noted
09 above, plaintiff failed to properly exhaust his claim that any of the defendants or proposed
10 defendants failed to expedite surgical repair of his severed tendons. Thus, plaintiff may not
11 proceed against P.A. King as to that claim. However, to the extent plaintiff alleges that P.A. King
12 failed to provide him adequate medical care for his injured hip plaintiff has arguably alleged
13 sufficient facts at this juncture to allow plaintiff to proceed against P.A. King. Accordingly,
14 plaintiff should be permitted to amend his complaint to add his claims against P.A. King which
15 pertain to his hip injury.

16 e. Dr. Munk

17 Plaintiff asserts that Dr. Munk, the orthopedic surgeon at Valley General Hospital who
18 performed the surgery on plaintiff's hand, denied him adequate medical care when he failed to
19 expedite the surgical repair of plaintiff's severed tendons, failed to listen to plaintiff's numerous
20 complaints of cramping, swelling, and loss of mobility, and failed to prescribe additional testing
21 to identify potential long term risk of scarring and to identify reasons for the constant edema and
22 cramping. As noted above, plaintiff failed to properly exhaust his claim that any of the defendants

01 or proposed defendants failed to expedite surgical repair of his severed tendons. Thus, plaintiff
02 may not proceed against Dr. Munk as to that claim. However, plaintiff has arguably alleged
03 sufficient facts at this juncture to allow plaintiff to proceed against Dr. Munk with respect to his
04 claims arising out of Dr. Munk's post-surgical care of plaintiff's hand. Accordingly, plaintiff
05 should be permitted to amend his complaint to add his claims against Dr. Munk which pertain to
06 the post-surgical care of plaintiff's hand.

07 **3. *Grievance Process***

08 Plaintiff alleges in his proposed amended complaint that defendants Bustanaby and
09 Carmody, as well as Grievance Coordinator S. Collins, denied him access to the grievance process.
10 More specifically, as to defendants Bustanaby and Carmody plaintiff contends that they delayed
11 delivery of grievances responses on at least two occasions "nearly" causing dismissal and
12 preventing access to the courts. As to Grievance Coordinator Collins, plaintiff appears to contend
13 that she deprived him of access to the grievance process when she refused to file and/or respond
14 to grievances concerning the issue of plaintiff's transfer to another facility.

15 The Constitution creates no entitlement to prison grievance procedures. *Mann v. Adams*,
16 855 F.2d 639, 640 (9th Cir. 1988). Accordingly, prison officials' failure to comply with a state's
17 grievance procedure is not actionable under § 1983. *Brown v. Dodson*, 863 F.Supp. 284, 285
18 (W.D. Va. 1994)(citing *Mann*, 855 F.2d at 640.) Thus, even assuming, as plaintiff argues, that
19 defendants Bustanaby and Carmody, and Grievance Coordinator Collins, failed to comply with the
20 state grievance procedure, plaintiff has not stated a claim upon which relief may be granted in
21 these § 1983 proceedings. Accordingly, plaintiff's motion to amend his complaint should be
22 denied with respect to plaintiff's claims concerning the grievance process.

01 complaint be granted in part and denied in part. Specifically, this Court recommends that
02 plaintiff's motion to amend be granted with respect to plaintiff's claims against P.A. King which
03 pertain to plaintiff's hip injury. This Court also recommends that plaintiff's motion to amend be
04 granted with respect to plaintiff's claims against Dr. Munk which pertain to the post-surgical care
05 provided to plaintiff for his hand injury. Finally, this Court recommends that plaintiff's motion to
06 amend be denied in all other respects. A proposed order accompanies this Report and
07 Recommendation.

08 DATED this 24th day of January, 2008.

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10 Mary Alice Theiler
11 United States Magistrate Judge
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